English Coal Company, Inc. *and* Danny J. Wiscaver.
Case 25-CA-13119

September 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 15, 1982, Administrative Law Judge Steven M. Charno issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the formal settlement agreement of Case 25-CA-10252, *et al.*, the Respondent stipulated it engaged in the following violations of the Act relating to the union activities of its employees: interrogation; threats to close the mine, discharge, transfer, or take other reprisals; surveillance of union activities; discharge of a supervisor for failing to commit unfair labor practices; transfer, layoff, and discharge of employees; and failing to recall the unlawfully laid-off employees. The Charging Party here, Danny Wiscaver, was one of the 29 employees who had been unlawfully laid off or discharged. We note that the settlement agreement provided, *inter alia*, that the Respondent cease and desist from "[i]n any manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act." The agreement also contained the following language at par. 22:

> This Stipulation may not be used as evidence of a violation in any proceeding not involving the Board. Evidence of alleged violations resolved by this Stipulation may, however, be utilized as background evidence in any concurrent or subsequent proceeding involving the Board.

The Board has relied upon formal settlement agreements which do not contain a nonadmissions clause, such as this settlement agreement, to show a proclivity to violate the Act. *Local 945, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Newark Disposal Service, Inc.)*, 232 NLRB 1 (1977), enfd. 84 LC ¶ 10,929 (3d Cir. 1978). See also *Tri-State Building and Construction Trades Council, AFL-CIO (Structures, Inc.)*, 257 NLRB 295, fn. 1 (1981). This is all the more true where, as here also, the settlement agreement contains language permitting its later use in Board-related proceedings. See *Teamsters Local 70, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 261 NLRB 496, 502 (1982); *Sequoia District Council of Carpenters, AFL-CIO (Nick Lattanzio Enterprises)*, 206 NLRB 67, 69 (1973), enfd. 499 F.2d 129 (9th Cir. 1974).

We have considered the nature of the above misconduct and the Respondent's repetition of its unlawful discharge of Wiscaver, which we find here. Applying the standard for broad cease-and-desist orders established in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), which cited as an example this very pattern of misconduct, one discharge and earlier severe violations, we find that the Respondent has engaged in a continuing pattern of serious unlawful misconduct and has demonstrated a proclivity to violate the Act. We, therefore, adopt the Administrative Law Judge's recommendation of a broad cease-and-desist order.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, English Coal Company, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

DECISION

STATEMENT OF THE CASE

STEVEN M. CHARNO, Administrative Law Judge: In response to a charge filed February 3, 1981, a complaint was issued on April 29, 1981, which alleges that English Coal Company, Inc. (Respondent), had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by discharging its employee, Danny J. Wiscaver. Respondnt's answer denies the commission of an unfair labor practice.

A hearing was held before me in Evansville, Indiana, on October 15 and 16, 1981. At the hearing, the complaint was amended over Respondent's objection to include an allegation that Respondent had violated Section 8(a)(4) of the Act. Briefs were filed by the General Counsel and Respondent under extended due date of December 21, 1981.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New Mexico corporation engaged in the business of mining, processing, selling, and distributing coal and related products. It maintains an office in Evansville, Indiana, and operates the E-Victor Mine in Lynnville, Indiana. During the year preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, sold and shipped coal and related products valued in excess of $50,000 from locations in Indiana to points outside the State and purchased and received goods and materials valued in excess of $10,000 at locations in Indiana from points outside the State. It is admitted and I find that Respondent is an employer engaged in commerce within the meaning of the Act.

The United Mine Workers of America (the Union) is admitted to be and I find is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent and the Blue Creek Mining Company, Inc. (Companies), are part of a single, integrated business enterprise; they are commonly operated and share common officers, directors, and ownership. The Companies are admitted to share a commonly formulated and administered labor policy. In 1978, the Companies operated the Sugar Creek Mine, located near Montgomery, Indiana. Mine Superintendent Harold Barnett was in charge. Below Barnett in the table of organization was First-Shift Foreman Gary Harrawood. Both individuals had the authority to hire and fire employees and both participated in management meetings during which the Companies' labor policy and practices were discussed. Below Gary Harrawood in the table of organization was the foreman of the second shift, Steve Harrawood, who spent 90 percent of his time supervising, had authority to assign and monitor work and to permit employees to leave early, and was entirely responsible for operations in the absence of his superiors.[1]

In late September or early October 1978, employees of the Sugar Creek Mine began an organizing campaign on behalf of the Union. During that campaign, Wiscaver and several other employees signed union cards. Wiscaver gave the following uncontroverted testimony, which I credit. In early October 1978, Steve Harrawood repeatedly interrogated Wiscaver as to whether Wiscaver had signed a union card or had any information on the organizing campaign. Later that month, Steve Harrawood and his assistant, John Meyer, again interrogated Wiscaver about whether Wiscaver had signed a union card and accused him of lying when Wiscaver denied knowledge of the organizing campaign. During that conversation, Meyer told Wiscaver that candor about the organizing campaign might save Wiscaver's job and suggested that, if the organizing campaign were successful, it might result in the removal of mining equipment which would cost all of the employees their jobs.

Gary Harrawood testified that, during an October 11, 1978, conversation with the mine superintendent, Barnett told him that the Companies were going to break the Union's organizing drive. At that time, Barnett showed Harrawood two lists: one disclosed the names of known union supporters, who had been transferred to another mine; the other list was of suspected union sympathizers, who were to be discharged on the pretext of being reckless or hard on equipment. Wiscaver was on the second list. Harrawood also testified about an October 13, 1978, meeting with Walter English, Dan English, Barnett, and Barnett's assistant. Walter English was and is the Companies' president and Dan English, their vice president of operations. At that meeting, the Union's organizing campaign was discussed, and Barnett and Dan English criticized Harrawood because he was not hard enough on union sympathizers. On or about October 19, 1978, Harrawood was discharged by the Companies.[2]

Shortly thereafter, the Companies closed the Sugar Creek Mine and terminated or laid off its employees.[3]

The foregoing and other related events resulted in the filing and consolidation of numerous complaints against the Companies between November 17, 1978, and August 31, 1979, in Case 25-CA-10252, *et al.* On January 24, 1979, Wiscaver appeared and voted at a stipulated representation election. Of the 57 votes counted, only 6 were votes against the Union. In connection with the complaints issued against the Companies, Wiscaver gave an affidavit to the Board and was subpoenaed to testify at a Board hearing which commenced on September 17, 1979. Wiscaver did not testify, and there is no evidence that Respondent was aware of either the affidavit or Wiscaver's presence at the hearing.

On October 19, 1979, the Companies entered into a formal settlement agreement, which was amended on November 21, 1979, resolving the foregoing litigation. That agreement did not contain a nonadmission clause. As here pertinent, the agreement required that 30 individuals employed at Sugar Creek Mine, including Wiscaver and Gary Harrawood, be made whole for the loss of earnings resulting from their discriminatory discharges. The agreement further provided that , in the event the Companies resumed mining operations in Indiana within 30 months of the settlement, each employee of the Sugar Creek Mine would be recalled on a preferential basis in order of seniority to his former position, a substantially equivalent position, or any other job he could perform as evidenced by his prior assignment to such a job. Wiscaver was included on this preferential hiring list.

B. *Discharge of Danny J. Wiscaver*

Respondent opened the E-Victor Mine in Lynnville, Indiana, during November 1980. Strip mining operations began at the mine on January 5, 1981, the day Wiscaver began working there. Wiscaver was recalled by Respondent as a machine operator at the E-Victor Mine

[1] In the context of a subsequent representation election, Gary and Steve Harrawood were both stipulated by the Companies to be supervisors within the meaning of Sec. 2(11) of the Act.

[2] Respondent offered no evidence to contradict or rebut the substance of Harrawood's testimony. In an apparent attempt to attack his credibility, Respondent called Ken English, the Companies' executive vice president, who testified that Harrawood had been discharged for threatening employees, occasionally carrying a gun on the job contrary to the Companies' rules, and physically assulting the Companies' safety supervisor, Young. Ken English further testified that he would have fired Barnett had English seen Barnett carrying a gun on duty. English repeatedly denied any knowledge of Barnett's doing so.

Harrawood testified that he had never physically assulted an employee and had never threatened Young. It was established by the credited testimony of the General Counsel's witnesses that Barnett, in fact, consistently carried at least one sidearm in a holster while on duty, and it was further established that Barnett had been seen in Ken English's presence while doing so. Because of the inherent improbability of Ken English's purported failure to notice the holstered sidearm regularly carried by Barnett and based on my observation of his demeanor while testifying, I do not credit his testimony concerning the reasons for Harrawood's discharge. Because of the failure of Respondent's attack on Harrawood's credibility and based on my observation of his demeanor while testifying, I credit Harrawood's testimony set forth in the accompanying text.

[3] While the date of closure of the Sugar Creek Mine was not stipulated, the consolidated complaint dated August 31, 1979, in Case 25-CA-10749 alleges it to be November 20, 1978.

pursuant to the Board's Order in Case 25-CA-10252, *et al.* Mine Superintendent Luther "Abe" Leslie[4] assigned Wiscaver to run a Michigan 475 front-end loader, the largest piece of production equipment at the mine. When previously employed by the Companies at the Sugar Creek Mine, Wiscaver had operated a similar machine of approximately half the size for 3-1/2 months without incident or criticism. A fellow employee at the Sugar Creek Mine, who had operated a loader and had ample opportunity to observe Wiscaver, credibly testified that Wiscaver was a good operator. Prior to his employment at the Sugar Creek Mine, Wiscaver had run a loader of less than half the size of the Michigan 475 for 9 months for another company. Subsequent to the closing of the Sugar Creek Mine, Wiscaver was the substitute operator of a loader equal in size to the Michigan 475 for a period of 6 months during 1979.

1. The day of the discharge

Wiscaver appeared for work on Monday, January 12, 1981, between 9 and 9:30 a.m. His work assignment for the day was given him by the leadman, Charles Barton. Between 9 and 10:30 that morning, Ken English visited the mine to introduce Leslie to Steven Stallings, the new assistant to Respondent's president.[5] While at the mine, Ken English spoke to Leslie about Wiscaver. Upon leaving the mine at approximately 11:15 a.m., Ken English met Dan English as the latter was arriving. The two had a conversation about activities at the mine, which included a discussion of Wiscaver.

Between 12:30 and 12:45 p.m., Dan English called Leslie over to complain about Wiscaver. During the ensuing discussion, it was established that Wiscaver would be discharged at the end of the day. Dan English returned to Respondent's Evansville office sometime between 1:30 and 2 p.m. and informed Respondent's bookkeeper, Sally Carr, that Wiscaver was to be terminated. Carr telephoned Ken English, who returned to the office and instructed Carr to prepare Wiscaver's check. Carr testified that she telephoned the mine to ascertain the number of hours Wiscaver had worked but received no answer.[6] At 2:30 p.m., Carr prepared a check for Wiscaver, which contained wages for six 8-hour days. Ken English gave the check to Stallings and instructed him to take it to the mine and to witness Wiscaver's discharge. Of the 15 discharges and 3 layoffs which occurred during the first 9 months of operation of the E-Victor Mine, only Wiscaver's termination was witnessed by a representative of management.

Between 2:30 and 3 p.m., the bucket pin on Wiscaver's loader broke as he was backing away from the wall and raising the bucket. At Barton's instructions, Wiscaver moved the loader up the hill to a point beside the fuel tanks where it was usually parked. Wiscaver and a fellow employee, Bill Hensley, examined the damage to the loader and observed that three-fourths of the broken end of the pin was rusted over at the point of the break indicating that the pin had previously been cracked to that extent. Shortly thereafter, Leslie arrived, and Wiscaver brought the rusted condition of the pin to his attention. Leslie acknowledged the condition of the pin and did not blame Wiscaver for damage to the equipment.[7]

Wiscaver credibly testified that, from the cab of the loader, he was unable to see the pin working loose and was, therefore, not in a position to prevent its breaking. Wiscaver's testimony is supported by that of the General Counsel's witness, Robert Spaulding, an organizer for the Union, who was shown to be familiar with loaders and who examined the machine in question at the time of the hearing. Spaulding testified that, looking at the bucket from the operator's area of the loader, the pin in question could not be seen unless the bucket was almost fully extended up into the air. It is not contended by any party that the bucket was so extended at the time of the breakdown. Spauldings' testimony was further confirmed by my examination of the dealer catalogs and the picture of the loader placed in evidence by the General Counsel. Accordingly, I find that Wiscaver was not able to see the pin slip out at the time of the breakdown, and any damage to the loader caused by the breaking of the pin is not ascribable to a negligent act or omission by Wiscaver.[8]

Between 3 and 3:15 p.m., Stallings arrived at the mine and walked to the area beside the fuel tanks where he met Leslie.[9] Stallings gave Leslie Wiscaver's check and told Leslie that Stallings had been instructed to witness the discharge. At Leslie's request, Stallings walked some 300 to 400 yards back to the trailer. Leslie then asked Wiscaver to join him in his truck. Leslie admitted that he wanted Wiscaver "up front" because Leslie wanted to talk to him. Wiscaver credibly testified that, during the ride, Leslie told Wiscaver that Dan English had told Leslie to lay Wiscaver off because Wiscaver did not run the loader fast enough.[10] At this point, Leslie gave Wis-

[4] Leslie was previously employed by Respondent as a foreman for a 1-year period during 1978.

[5] Ken English placed the time of arrival between 9 and 10 a.m., while Stallings believed it to be between 10 and 10:30 a.m.

[6] Carr admitted that she had previously told a Board agent that she talked with Leslie on January 12, 1981, concerning Wiscaver's discharge.

[7] The testimony given by Wiscaver and Hensley is generally in accord concerning the condition of the pin and Leslie's examination of the loader. Leslie did not testify concerning the condition of the pin, and Barton, who examined the pin subsequently, was unable to remember its condition. For the foregoing reasons and based on my observation of the demeanor of Wiscaver and Hensley as they testified, I credit their version of what occurred.

[8] Leslie variously testified that Wiscaver could have seen the pin when the bucket was 4 feet off the ground and when it was about as high as the tires, a height Leslie had previously noted to be 8 feet. Based on this inconsistency, the credited testimony set forth in the accompanying text, and my observation of the demeanor of the witnesses as they testified, I do not credit Leslie's testimony.

[9] Leslie variously testified that this meeting occurred at the fuel tanks and at the trailer which served as the mine office. Stallings' testimony places the meeting away from the trailer. I credit the consensual version.

[10] Leslie's testimony that he was "pretty sure" he said nothing to Wiscaver during the ride cannot be credited for several reasons. First, if Leslie did not speak to Wiscaver during the ride, there is no discernable reason for Leslie asking Stallings to walk back to the trailer alone, rather than giving him a ride, or for Leslie's asking Wiscaver to sit up front in order to talk to him. Second, Leslie's explaining Wiscaver's discharge in the truck comports with Leslie's normal practice, as to which both Leslie and Barton testified, of taking an employee aside to fire him, rather than discharging him in front of other employees. Finally, Wiscaver's subsequent condemnation of Dan English for firing him and Wiscaver's vitu-

Continued

caver his check.[11] After he received his check, Wiscaver noted that he had been paid for 8 hours although he had only worked 6 hours that day. At Leslie's direction, Wiscaver went to fill out his timecard in the trailer.[12] After filling out his timecard, Wiscaver commented to a fellow employee that his layoff was simply a cowardly way of firing him.

Wiscaver then left the office and, on the porch in front of the trailer, asked Leslie how long he was to be laid off, whereupon Leslie indicated that the layoff was permanent.[13] At this point, Wiscaver again asked Leslie about the reason Dan English had given for laying him off, and, on receiving the answer, Wiscaver profanely indicated that he could outperform Dan English and stated that he would punch English in the mouth if English were present. Hensley, whom Wiscaver mistakenly believed to be inside the trailer during this discussion, corroborated Wiscaver's testimony in essential detail.[14] Shortly thereafter, Wiscaver left the mine.

On April 17, 1981, approximately 2-1/2 months after the charge in this proceeding was filed, Respondent offered Wiscaver reinstatement as a laborer, but not as an equipment operator. It was stipulated that a laborer makes approximately $1 per hour less than an equipment operator.

2. Reasons asserted for the discharge

At various times, Respondent has advanced three different reasons for Wiscaver's termination: Wiscaver was discharged because (1) he negligently damaged his loader on January 12, 1981; (2) he was unable to run the loader; and (3) he had a "bad attitude." None of these reasons is substantiated by the record.

Wiscaver's alleged negligent operation of the loader on January 12 was given by Respondent as one of the reasons for the discharge on several occasions. Leslie so informed the Board agent who initially investigated the charge made by Wiscaver.[15] Wiscaver's personnel file bears a notation dated January 12, 1981, and initialed by Leslie and Stallings, which states that the breakdown of the loader was a reason for Wiscaver's termination.[16] Finally, a May 7, 1981, letter from Respondent to the Indiana employment office, which was signed by Stallings, asserts that Wiscaver's negligent operation of the loader was one of the reasons for his termination.[17] On the stand, Leslie repeatedly denied that damage to the loader was a reason for Wiscaver's discharge. I find that Respondent falsely asserted that Wiscaver was terminated for negligently damaging the loader and infer that Leslie recanted this false assertion at the hearing solely because it was discovered (sometime subsequent to May 7) that

perative comparison of his speed of running the loader with that of English, discussed *infra*, would be totally inexplicable if Wiscaver had not been told that Dan English was responsible for the discharge.

[11] Leslie and Stallings both testified that Wiscaver was given his check later in a discussion in front of the trailer. Although Stallings generally testified in a straightforward, organized manner, his testimony concerning the events of January 13, 1981, discussed *infra*, demonstrates that he was capable of unabashed prevarication when he deemed that course favorable to Respondent. Hensley, who was standing 12 feet away from the discussion in front of the trailer, did not see Wiscaver receive his check. For these reasons and those discussed in the preceding note, and as a result of my observation of the demeanor of the witnesses while they were testifying, I credit Wiscaver on this point. Wiscaver also testified that Leslie told him that Dan English brought the check to the mine. English did not bring the check, and there is no basis in the record to determine whether Wiscaver was merely confused or whether Leslie made the reported statement to minimize his own involvement in Wiscaver's discharge. There is no apparent advantage to Wiscaver in fabricating this statement.

[12] On brief, Respondent relies on Wiscaver's filling out a timecard after he had been terminated as an inconsistency which undermines his credibility. I do not find Leslie's desire to have the mine's records complete to be incomprehensible, especially where Leslie was dealing with the first discharge at the E-Victor Mine.

[13] Leslie variously testified that Wiscaver was terminated inside the trailer and on the porch in front of it. Leslie also testified that he did not speak of a layoff but told Wiscaver that he was being discharged. Stalling confirms Wiscaver's testimony that Leslie and Wiscaver spoke of a layoff. For the foregoing reasons, and based on my observation of the demeanor of the witnesses while testifying, I credit Wiscaver on this point. Respondent's brief asserts that Wiscaver's questioning of the permanency of his layoff after telling another employee that he thought he had been fired is a glaring inconsistency. Within my experience, however, such a method of ascertaining the reality of a feared outcome is well within the normal range of human behavior.

[14] Leslie testified that he did not mention Dan English or indicate to Wiscaver that Wiscaver had not operated the loader fast enough during the discussion outside the trailer. This testimony corresponds with Stalling's description of the discussion. However, both individuals confirmed that, during the discussion outside the trailer, Wiscaver had attributed his discharge to Dan English and had indicated that he could outperform English on the loader. As noted previously, Wiscaver's comments concerning Dan English would be inexplicable in the absence of any indication by Leslie that English was responsible for Wiscaver's discharge. For these reasons and based on my observation of the demeanor of the witnesses as they testified, I credit Wiscaver and Hensley with respect to the content of the conversation outside of the trailer.

[15] During examination by counsel for the General Counsel, Leslie repeatedly testified that he could not recall whether he had told the Board agent that Wiscaver was discharged in part for damaging the loader. After extended examination, Leslie's initial testimony broke down, and he admitted that he had told the Board agent that one of the reasons for Wiscaver's discharge was the breakdown of the loader. Leslie also maintained that he could not recall whether he had told the Board agent that he had called Respondent's Evansville office after the loader breakdown to arrange for Wiscaver's discharge. Based on Leslie's conflicting response and on my observation of his demeanor while testifying, I find that his testimony concerning his conversation with the Board agent was prompted by his desire to provide testimony favorable to Respondent, rather than by any failure of memory on his part.

[16] Leslie testified that it was his practice to make notes of all disciplinary actions and that the notations on Wiscaver's personnel file were prepared from such notes. Leslie twice testified that he had initialed the notation dated January 12 on the morning of that date. Thus, Leslie testified that he had signed the notation at a point in time prior to the breakdown of the loader which was chronicled in that notation. Finally, Leslie testified that he did not have any conversations with Stallings after January 12 concerning Wiscaver's discharge. Leslie's testimony on these points is contradicted in every particular by Stallings, who testified that (1) all disciplinary matters were handled in conversations, rather than in writing, (2) Stallings was unaware of any notes from Leslie concerning Wiscaver, (3) all notations on Wiscaver's personnel file were prepared by Stallings based on a conversation with Leslie on January 13, and (4) Leslie approved the notations and initialed them on January 14. Because Stallings' testimony runs counter to the interest of his employer and Leslie's testimony is internally contradictory and illogical, and based on my observation of the demeanor of the witnesses as they testified, I credit Stallings' testimony on the above points. Stallings' subsequent testimony (in response to examination by Respondent's counsel) that Leslie had never told Stallings that Wiscaver was discharged because of the breakdown of the loader appears to demonstrate nothing more than Stallings' willingness to prevaricate in the interest of his Employer.

[17] This letter casts additional doubt on Stallings' testimony that Leslie had never told Stallings that damage to the loader was a reason for Wiscaver's discharge. For the foregoing reasons and based on my observation of Stallings' demeanor while testifying, I do not credit his testimony on this point.

Wiscaver's termination check had been drawn before the loader was damaged.

Although Leslie began his testimony with the assertion that the only reason for the discharge was Wiscaver's inability to properly operate the Michigan 475 front-end loader, his subsequent testimony continually shifted between this explanation and an assertion that Wiscaver's "bad attitude" was the reason for the discharge.[18] Specifically, it was repeatedly asserted that Wiscaver's performance was inadequate because Wiscaver regularly failed to get full loads of overburden in the bucket of the loader and because Wiscaver ran over rocks which might damage the loader's tires.[19] For example, in testifying concerning an alleged observation of Wiscaver's performance, Leslie stated that Wiscaver "was getting about half a bucket" and "there'd be a rock or two fall off the bucket down onto the roadway" which Wiscaver then ran over. Initially, I have difficulty conceptualizing how rocks fall off the top of a half-filled bucket, and my reference to the catalogs and picture showing the loader does nothing to resolve this difficulty. What Leslie purports to describe appears to be physically impossible. Other testimony by Leslie concerning Wiscaver's alleged poor performance was shown to be equally implausible.[20]

In contrast, Hensley, a fellow employee who has operated loaders and who daily observed Wiscaver's performance from January 5 through 12, testified credibly that, when he observed Wiscaver's bucket, it was between three-fourths full and completely full. Hensley further credibly testified that, based on his observation of the operation of the Michigan 475 front-end loader by Wiscaver and others, Wiscaver did a "decent job." Wiscaver credibly denied that he had ever been reprimanded for running over rocks or for failing to get a full load of overburden in the bucket of his loader. Wiscaver also credibly related a conversation he had with Leslie on January 7 or 8 in which Wiscaver inquired as to whether Leslie had any complaints concerning Wiscaver's performance, and Leslie replied that he had none and told Wiscaver that Wiscaver was doing as well as could be expected under the adverse conditions then prevailing in the pit. I credit this testimony and find that there is no reliable, probative evidence which would indicate that Wiscaver was warned or reprimanded for inadequate performance prior to January 12.[21]

C. *Analysis*

The General Counsel asserts that Wiscaver's discharge violated Section 8(a)(1) and (3) of the Act. While there is no evidence that Respondent had specific knowledge of Wiscaver's union activities, it was established that Wiscaver was identified by Respondent in 1978 as a suspected union sympathizer and was slated to be discharged from the Sugar Creek Mine in an effort by Respondent to frustrate the Union's organizing campaign. The unconfirmed belief that an employee has engaged in protected activities is sufficient to show the element of knowledge required in establishing a discriminatory discharge violative of the Act. E.g., *Gulf-Wandes Corp.*, 233 NLRB 772, 778 (1977); *Brooklyn Nursing Home, d/b/a Sassaquin Convalescent Center*, 223 NLRB 267, 276 (1976). Subsequently, Wiscaver was recognized by Respondent as an individual it was required to make whole for a discrimi-

[18] Leslie variously testified in substance that Wiscaver worked well when Wiscaver wanted to do something; that Leslie did not think he had told Wiscaver that Wiscaver was a good worker; that, while Leslie might have said Wiscaver was a good worker, Wiscaver could not handle the loader; that Wiscaver could run the loader when Wiscaver wanted to do so; that Wiscaver could not run the loader; that Wiscaver was not a good worker; that Wiscaver's ability, not Wiscaver's attitude, was the problem; and that, after a reprimand by Leslie, Wiscaver would do well for a short time and then revert to a poor level of performance. Because of my observation of Leslie's demeanor while testifying and based on the internal contradictions manifested throughout his testimony concerning the reason for Wiscaver's discharge, I cannot credit any of the testimony noted herein.

[19] It is Respondent's position that Wiscaver's alleged poor performance began on January 5 and continued through the day of his discharge. In support of this position, Dan and Ken English testified that they had repeatedly observed Wiscaver performing inadequately during the period of his employ and had, on each occasion, communicated their observations to Leslie. Notwithstanding leading questions by Respondent's counsel, Leslie was unable to recall any conversation with Dan or Ken English concerning Wiscaver prior to January 12. Barton, who was still employed by Respondent as leadman at the time he testified, gave testimony similar to that of the English brothers, although Barton indicated that Wiscaver was tearing up the loader's tires by running over rocks. Should Wiscaver actually have damaged tires costing $8,000 to $9,000 each, it is inconceivable that no one else affiliated with Respondent would be aware of such damage. Because I credit the testimony of Wiscaver and Hensley concerning Wiscaver's performance, and based on my observation of the demeanor of the witnesses while testifying, I do not credit the testimony of Dan English, Ken English, or Barton on this issue.

[20] Upon direct examination as a witness for the General Counsel, Leslie repeatedly testified that he made the decision to terminate Wiscaver around noon on January 12. Leslie further testified that this decision was based on Wiscaver's failure to show consistent improved performance after being reprimanded by Leslie between 11 and 11:30 a.m. that day. In the closing minutes of Leslie's cross-examination as a witness for Respondent on the following day, Leslie appeared to retract this version of events through testimony that he decided to fire Wiscaver between 8 and 9 a.m. on January 12, based on Wiscaver's poor performance that morning. It is admitted that Wiscaver did not arrive for work on January 12 until after 9 a.m. For these reasons and those discussed in connection with my findings concerning Wiscaver's termination interview in Leslie's truck, and based on my observation of Leslie's demeanor while testifying, I do not credit his testimony that he was the individual who decided to terminate Wiscaver.

[21] Leslie testified that he had verbally reprimanded Wiscaver on January 5 and 6 and again on January 7 or 8 and had issued a written warning to Wiscaver on January 9. Wiscaver's personnel file contains a notation dated January 9 and initialed by Leslie and Stallings indicating that Wiscaver was warned that his performance was inadequate on that day and that he had a bad attitude. On examination by counsel for the General Counsel, Leslie testified that the January 9 notation was initialed by him on January 9 and was based on a written warning issued to Wiscaver that day. Later, in response to a leading question by counsel for Respondent, Leslie testified that he did not issue a written warning to Wiscaver. As noted earlier, Stallings credibly testified that there was no written memorialization of disciplinary action by Leslie, and that the file notation dated January 9 was dictated by Leslie on January 13 and initialed on January 14. Because of the quicksilver nature of Leslie's testimony and for the reasons stated in my earlier discussion of the personnel file, substantiated by the fact that Stallings was not employed by Respondent on January 9, I do not credit Leslie on these points. I find that Wiscaver's personnel file was prepared after his discharge, was backdated to lend substance to otherwise unsubstantiated charges against Wiscaver, contains demonstrated falsehoods, and is without probative value on the question of Wiscaver's performance. I further find that Wiscaver did not receive a written warning from Leslie. Finally, based on my observation of Leslie's demeanor while testifying and on the admission wrung from him that he might have told Wiscaver that Wiscaver was a good worker, I do not credit his testimony that he issued verbal reprimands to Wiscaver.

natory discharge and whom it was required to rehire on a preferential basis pursuant to a formal settlement which did not contain a nonadmission clause. I therefore conclude that Respondent believed that Wiscaver was participating in protected concerted activities.

Respondent's original animus toward union activities is demonstrated by the Companies' interrogation, threats, and overall strategy for countering the 1978 union organizing campaign. The nature and extent of Respondent's hostility to the Union provides a basis for inferring that Wiscaver's discharge was unlawfully motivated. The fact that there is no intervening evidence of discriminatory motivation between 1978 and 1981 must be evaluated in light of the fact that Respondent had no opportunity to engage in discriminatory conduct between the time the Sugar Creek Mine closed in 1978 and the time it began to hire employees to operate the E-Victor Mine in 1981. At the latter point in time, Wiscaver was recalled and terminated within 8 days of being hired. Contemporary evidence of Respondent's unlawful motivation is provided by the false, shifting, and implausible reasons which Respondent advanced for Wiscaver's discharge. See *Patrick Plaza Dodge, Inc.*, 210 NLRB 870, 873 (1974). In that context, I find that all of the reasons advanced by Respondent for Wiscaver's discharge are untrue, and I conclude that the reason asserted at hearing and on brief by Respondent, i.e., Wiscaver's inability to operate the loader, was purely pretextual. This conclusion is compelled by the following facts: Wiscaver's performance at the Sugar Creek Mine was never questioned and he was recalled by Respondent as an equipment operator; Wiscaver had extensive experience operating such equipment, including loaders of the size owned by Respondent; and objective observers of Wiscaver's performance both before and during his tenure at the E-Victor Mine found that performance to be acceptable. For the foregoing reasons, I conclude that Respondent's discharge of Wiscaver did violate Section 8(a)(1) and (3) of the Act.

The General Counsel also asserts that Wiscaver's discharge violated Section 8(a)(1) and (4) of the Act. In arguing in opposition to a motion to dismiss, counsel for the General Counsel indicated that the language of the complaint alleging a violation of Section 8(a)(4) should be taken to mean that Respondent had reason to believe that Wiscaver gave testimony under the Act in the form of an affidavit and pretrial statements because Wiscaver appeared to testify at the hearing in Case 25-CA-10252, *et al.* As noted above, I found there to be no evidence that Respondent was aware of either Wiscaver's affidavit or his presence at the hearing. I do not believe there is sufficient evidence in the record to warrant the inference requested by the General Counsel that Respondent's demonstrated interest in the union activities of its employees requires a finding that Respondent knew which of its employees appeared at the hearing. I therefore conclude that the allegation that Respondent violated Section 8(a)(1) and (4) of the Act by discharging Wiscaver is without record support and should be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging employee Danny J. Wiscaver for engaging in union and other protected concerted activity, Respondent committed an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.
4. A preponderance of the credible evidence does not establish that Respondent has otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including posting the customary notice, designed to effectuate the purposes of the Act. Specifically, I shall recommend that Respondent be ordered to offer Wiscaver immediate and full reinstatement to his former job, discharging any replacement if necessary, or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed. I shall further recommend that Respondent be ordered to make Wiscaver whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his termination, January 12, 1981, until the date of Respondent's offer as herein ordered, less net earnings, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), to which shall be added interest to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[22] Finally, I shall recommend that Respondent expunge from its files any reference to Wiscaver's reprimand on January 9, 1981, and discharge on January 12, 1981, and notify him in writing that this has been done and that evidence of that reprimand and that discharge will not be used as a basis for future personnel actions against him. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). While the reprimand was not identified in the complaint as an unfair labor practice, the fact that it was part of the purported basis for Wiscaver's discharge and the fact that the question of its falsity was fully litigated require that it be expunged.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

The Respondent, English Coal Company, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall:

[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the *Continued*

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees for engaging in union or other protected concerted activity.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to engage in or refrain from engaging in any or all the activities specified in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Danny J. Wiscaver immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the reprimand of Danny J. Wiscaver on January 9, 1981, and to the discharge of Danny J. Wiscaver on January 12, 1981, and notify him in writing that this has been done and that evidence of that reprimand and that unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Lynnville, Indiana, facility copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that allegations of the complaint not specifically found herein be, and they are hereby, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees in order to discourage membership in United Mineworkers of America or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

WE WILL offer Danny J. Wiscaver reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job without loss of seniority or other rights and privileges, and WE WILL make him whole for any pay he lost, with interest, because of our discrimination against him.

WE WILL remove from our files any reference to the reprimand of Danny J. Wiscaver on January 9, 1981, and to the discharge of Danny J. Wiscaver on January 12, 1981, and WE WILL notify him in writing that this has been done and that evidence of that reprimand and that unlawful discharge will not be used as a basis for future personnel actions against him.

ENGLISH COAL COMPANY, INC.

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findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."